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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MICHAEL MARIGNY, Plaintiff and Appellant, v. MERCURY AIR CENTER, Defendant and Respondent.	B156694 (Los Angeles County Super. Ct. No. BC229501)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard C. Hubbell, Judge. Affirmed in part; reversed in part with directions.

Abrolat & Teren, Pamela McKibbin Teren and Nancy L. Abrolat for Plaintiff and Appellant.

Kenney & Markowitz, Ken M. Markowitz and Jennifer M. Joaquin for Defendant and Respondent.

Plaintiff Michael Marigny sued defendant Mercury Air Center, his former employer, alleging racial discrimination, retaliation and wrongful discharge for

complaining about racial discrimination, negligence in permitting and failing to remedy racial discrimination, and intentional infliction of emotional distress. The trial court granted summary adjudication to defendant on the racial discrimination claim. At the jury trial on the remaining causes of action, the court granted defendant's motion for nonsuit on the claims of wrongful discharge and negligence and struck plaintiff's claim for punitive damages. The jury returned a verdict for defendant on the retaliation claim and awarded plaintiff $15,000 on his emotional distress claim. Plaintiff filed a timely appeal from the judgment.

We have concluded the trial court erred in granting defendant's motion for summary adjudication on the cause of action for racial discrimination because there are triable issues of fact as to whether the conduct of defendant's employees, supervisors and managers created a hostile work environment and discrimination based on race. The court further erred in granting a nonsuit on the theory of negligent failure to prevent and remedy racial discrimination and on plaintiff's claim for punitive damages. Finally, we conclude the trial court committed prejudicial errors in the trial of plaintiff's cause of action for intentional infliction of emotional distress and plaintiff is entitled to a retrial of that cause of action limited to compensatory and punitive damages.

FACTS AND PROCEEDINGS BELOW

Because most of the issues raised in this appeal are fact-specific we will not set out a detailed recitation of the facts here. The relevant facts are discussed in our resolution of the issues below.

In summary, Marigny was employed by Mercury as an aircraft refueler from June 1995 to the end of December 1999 when Mercury terminated him. At the time of his termination Marigny worked as an instructor training new employees in the procedures for refueling aircraft at Los Angeles International Airport.

In opposition to Mercury's motion for summary adjudication Marigny, who is African-American, testified that throughout his employment with Mercury the word "nigger" was used "on a regular basis" by co-employees and low-level managers. One manager frequently taunted him as a being a "drug dealer" because he was African-

American and wore two telephone pagers. It is undisputed Marigny complained to his immediate supervisor about these remarks but no action was taken.

In an incident which became the focal point of this suit, Marigny alleged Willard, one of his trainees, called him a "skinny little nigger," referred to him as "boy" and threatened to "whoop" him in the presence of Marigny's immediate supervisor, Sribour. When Marigny turned to Sribour for assistance in handling the trainee Sribour's only response was to threaten to fire them both.

Marigny filed a written complaint with Mercury management regarding the trainee's behavior and his supervisor's failure to take appropriate action. The trainee resigned shortly after this incident. The company took no action with respect to Marigny's supervisor. On the contrary, when Marigny pursued his complaint regarding the incident Mercury's head of personnel told Marigny "everyone has the right to express themselves."

In support of its motion for summary adjudication Mercury presented evidence refuting Marigny's claim the trainee used the "N" word but otherwise did not materially dispute Marigny's testimony regarding his claim of racial harassment.

Approximately five months after Marigny filed complaints of racial discrimination with Mercury management and the EEOC, Mercury terminated him on the ground he had failed to provide adequate information on his employment background to satisfy Federal Aviation Administration security regulations applicable to all employees with unescorted access to airfield operations. Mercury informed Marigny he was eligible to be rehired if he furnished the necessary information.

Following his termination, Marigny initiated this action.

DISCUSSION

I. TRIABLE ISSUES OF FACT EXIST AS TO WHETHER THE CONDUCT OF MERCURY'S EMPLOYEES, SUPERVISORS AND MANAGERS CREATED A HOSTILE WORK ENVIRONMENT.

Mercury moved for summary adjudication of Marigny's claims of racial harassment and discrimination under the FEHA.[1] The trial court granted the motion as to both claims. We reverse.[2]

It is well settled the issues to be addressed on a defendant's motion for summary judgment or summary adjudication are framed by the plaintiff's complaint.[3] This means the plaintiff, in opposing the motion, cannot present a moving target by creating issues outside the complaint.[4] On the other hand, the defendant must show "that under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact which requires examination by trial."[5] In ruling on the motion the affidavits of the moving party are strictly construed and those of the opposing party are liberally construed.[6]

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[1] Government Code section 12940, subdivisions (a), (j).

[2] The trial court refused to hear oral argument on Mercury's motion. This was error but, contrary to Marigny's assertion, the error is not reversible per se. *Mediterranean Construction Co. v. State Farm Fire & Casualty Co.* (1998) 66 Cal.App.4th 257, 267.

[3] *Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1343.

[4] *Tsemetzin v. Coast Federal Savings & Loan Assn.*, *supra*, 57 Cal.App.4th at page 1342.

[5] *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 840; citation and internal quotation marks omitted.

[6] *Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142, 148.

"A defendant may succeed on a motion for summary adjudication by demonstrating the targeted cause of action has no merit. 'A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action . . . cannot be established or that there is a complete defense to that cause of action.'"[7]

Focusing solely on the incident in which Willard allegedly called Marigny a "skinny little nigger" and "boy" and threatened to "whoop" him, Mercury argued this single, isolated episode, even if it occurred the way Marigny described it, cannot support a cause of action for racial harassment as a matter of law. The trial court agreed.

We need not decide whether the one-time use of racial epithets may be sufficient to support a cause of action for harassment.[8] Marigny's complaint alleged more than this single episode involving Willard. The complaint also alleged Marigny's immediate supervisor, who was present when the racial slurs were made, did nothing to correct Willard when the incident occurred and when Marigny complained to upper management about the conduct of both Willard and the supervisor the Director of Human Resources brushed off the incident with the comment "everyone has the right to express

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[7] *Neubauer v. Goldfarb* (2003) 108 Cal.App.4th 47, 54; footnotes, citation and internal quotation marks omitted; Code of Civil Procedure section 437c, subdivisions (f)(1), (p)(2).

[8] In *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610, cited with approval in *Aguilar v. Avis Rent A Car System* (1999) 21 Cal.4th 121, 131, we held that to establish a hostile work environment "'sufficiently pervasive' harassment . . . cannot be occasional, isolated, sporadic, or trivial . . . ." The plurality opinion in *Aguilar* noted in dictum "a single use of a racial epithet, standing alone, would not create a hostile work environment." (*Id.* at p. 146, fn. 9. But see *Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 467 and cases cited therein; and see *Rodgers v. Western-Southern Life Ins. Co.* (7th Cir. 1993) 12 F.3d 668, 675 [suggesting even one "unambiguously racial epithet" may be sufficient under federal law to create an abusive working environment].) Willard's use of the "N" word plus his threat to "whoop" Marigny might be enough to establish racial harassment. See *Herberg v. California Institute of the Arts*, *supra*, 101 Cal.App.4th at page 151.

themselves." The complaint further alleged the Willard incident was only one example of the incidents of harassment suffered by Marigny during the course of his employment. Other incidents included being called a "drug dealer" by a white manager,[9] being denied promotion opportunities as a result of his race, being subjected to racially derogatory slurs in his presence and to treatment "in a belittling, demeaning manner."[10]

While some of the allegations in Marigny's complaint may be vague, Mercury did not demur to the complaint on this ground.[11] Therefore it was saddled with the burden of showing no material question of fact existed "within the reasonable purview of the allegations of the complaint."[12] Liberally construed, the allegations of the complaint could support claims for relief based on racial harassment,[13] racial discrimination in the terms, conditions and privileges of employment,[14] aiding and abetting racial harassment,[15]

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[9] Marigny testified he perceived this as a racial slur based on his race and his wearing two telephone pagers. The plaintiff's subjective perception of statements made in the work place is relevant to a claim of hostile work environment. *Aguilar v. Avis Rent A Car System*, *supra*, 21 Cal.4th at page 130.

[10] The plurality opinion in *Aguilar v. Avis Rent A Car System, Inc.* observed: "Continual use of racist epithets poisons the atmosphere of the workplace, even when some of the invective is not directed at or even heard by the victims." (21 Cal.4th at p. 145, internal quotation marks omitted.)

[11] See Code of Civil Procedure section 430.10, subdivision (f).

[12] *Murillo v. Rite Stuff Foods, Inc.*, *supra*, 65 Cal.App.4th at page 840.

[13] Government Code section 12940, subdivision (j).

[14] Government Code section 12940, subdivision (a).

[15] Government Code section 12940, subdivision (i).

and failure to take all reasonable steps necessary to prevent harassment from occurring[16] or remedying harassment which as occurred.[17]

The proper method for attacking Marigny's claims of racial harassment and discrimination would have been to show through discovery Marigny had no evidence to support his allegations regarding the denial of promotion opportunities, belittling or demeaning treatment, or the use of racial slurs (other than the Willard incident) and then argue the Willard incident was not sufficiently severe or pervasive to establish the existence of a hostile working environment.[18] Mercury did not follow this course. Instead, it spent most of its energy trying to establish Willard did not use the "N" word in his confrontation with Marigny. Mercury made no attempt to show Marigny lacked evidence to support his other alleged incidents of racial harassment and discrimination.

We conclude, therefore, the trial court erred in granting Mercury's motion for summary adjudication on the causes of action for racial harassment and discrimination.

II. THE TRIAL COURT ERRED IN GRANTING A NONSUIT ON MARIGNY'S CLAIM OF WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY BUT THE ERROR WAS HARMLESS.

At the close of Marigny's evidence Mercury moved for nonsuit or a directed verdict on the claim of wrongful termination in violation of public policy. The motion was made on the ground the claim of wrongful termination in violation of public policy and the claim of retaliation in violation of the FEHA were based on the same theory: Mercury terminated Marigny in retaliation for his complaints to management and

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[16] Government Code section 12940, subdivision (k).

[17] *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1528 [employer has duty to respond to sexual harassment charge even if alleged harassment has terminated].

[18] See *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 855 [defendant moving for summary judgment may "present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence . . ."].

the EEOC about the discrimination and harassment he suffered as a Mercury employee. Furthermore, the elements of proof and the parties' evidence were identical as to both claims. In Mercury's view, there was no need to present the jury with two identical claims.

Marigny countered by contending an employee is entitled to pursue parallel claims under the common law and the FEHA. Furthermore, his theory of wrongful termination in violation of public policy was not confined to retaliation for complaining about discrimination and harassment but was also based on retaliation for his demand to see his personnel file under the rights afforded him by Labor Code section 1198.5.

Marigny's first point is technically correct. In *Stevenson v. Superior Court*[19] our Supreme Court made clear the FEHA's employment discrimination remedies are cumulative, not exclusive, and a common law wrongful discharge claim "provides another legal theory on which employees may pursue remedies comparable in all relevant aspects to those already available to them under the FEHA."[20] Nevertheless, because the jury rendered a verdict for Mercury on the FEHA retaliation claim—a verdict we uphold[21]—the trial court's error was harmless.

Marigny's second argument fails for several reasons. He has cited no trial evidence he ever complained to anyone at Mercury about being denied access to his personnel file or that the person from whom he requested his file had any decisionmaking role in his termination. Thus we cannot determine whether there was any evidence to support this theory of retaliation. Furthermore, the material Marigny wanted to see was

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[19] *Stevenson v. Superior Court* (1997) 16 Cal.4th 880.

[20] *Stevenson v. Superior Court*, 16 Cal.4th at page 908. In an earlier case the court observed: "[E]mployment discrimination cases, by their very nature, involve several causes of action arising from the same set of facts. A responsible attorney handling an employment discrimination case must plead a variety of statutory, tort and contract causes of action in order to fully protect the interests of his or her client." (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 486, fn. omitted.)

[21] See Part V *post*.

material related to his security clearance. It is not clear Mercury had a duty to show Marigny this material.[22] Finally, we are not persuaded the duty to allow an employee to review certain material in his or her personnel file is a duty affecting the public at large.[23] The cases Marigny relies upon are distinguishable because they involved wage and hours laws which have long been held to concern the public health and general welfare.[24]

III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING A NONSUIT ON MARIGNY'S NEGLIGENCE CLAIM.

Mercury had a duty under the FEHA "not only to prevent harassment, but also once it became aware of any harassment to take reasonable steps to prevent it."[25] Courts have interpreted this provision as creating a tort sounding in negligence with the usual elements of breach of duty, causation and damages.[26]

Marigny's complaint pled a cause of action for negligence based on two theories: negligent failure to prevent and remedy racial harassment and negligent failure to prevent retaliation against Marigny for complaining about that harassment. At the close of Marigny's evidence, Mercury moved for a nonsuit on the negligence cause of action focusing solely on the theory it had failed to prevent retaliation against Marigny for

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[22] The public policy at issue must be "well established" and "sufficiently clear" to the employer. (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090.) Labor Code section 1198.5 only gives an employee the right to inspect personnel records "relating to the employee's performance or to any grievance concerning the employee."

[23] *Gantt v. Sentry Insurance*, *supra*, 1 Cal.4th at page 1090.

[24] *Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563, 571-572; *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1148.

[25] *Sheffield v. Department of Social Services* (2003) 109 Cal.App.4th 153, 164; Government Code section 12940, subdivisions (j), (k).

[26] *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 286-287.

complaining about racial harassment. Mercury did not address the companion theory it had negligently failed to prevent the harassment from occurring in the first place. The trial court granted Mercury's motion for nonsuit "as to . . . the cause of action for negligence." For the reasons explained below, the trial court should have allowed the case to proceed on the theory of negligent failure to prevent and remedy harassment.

A motion for nonsuit is essentially a demurrer to the evidence. It will be granted only where the plaintiff's evidence is insufficient to sustain a verdict.[27] "In determining the sufficiency of the plaintiff's evidence, the trial court may not weigh the evidence or consider the credibility of witnesses. Instead, the court must accept as true the evidence most favorable to the plaintiff, and disregard any conflicting evidence."[28]

The trial court ruled correctly in granting a nonsuit on the theory of negligent failure to prevent retaliation. Marigny's evidence showed his termination was authorized by Mercury's upper management, the same persons who would have had a duty to prevent retaliation by lower level managers. Therefore, if Marigny was terminated in retaliation for his complaints about racial harassment the retaliation was intentional, not negligent. Even if the trial court erred in not allowing the retaliation theory to go to the jury, the error was harmless because the jury found Mercury did not retaliate against Marigny.

The trial court erred, however, in granting a nonsuit on the theory of negligent failure to prevent and remedy racial harassment. A nonsuit may not be granted by the trial court nor affirmed on appeal on a ground not specified in the motion.[29] To do so

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[27] Code of Civil Procedure section 581c.

[28] *Nemarnik v. Los Angeles Kings Hockey Club* (2002) 103 Cal.App.4th 631, 635; citations omitted. Mercury styled its motion as one for a directed verdict. The standard is the same. *Richie v. Bridgestone/Firestone, Inc.* (1994) 22 Cal.App.4th 335, 337, footnote 2.

[29] *Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1542.

would deprive the plaintiff of the opportunity to remedy any defects in its proof.[30] Because Mercury's motion for nonsuit did not address the negligent prevention of harassment theory, it was error to grant the motion as to this theory.[31] Furthermore, Marigny presented evidence to support recovery under this theory.

IV. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING A NONSUIT ON MARIGNY'S CLAIM FOR PUNITIVE DAMAGES.

The trial court granted Mercury a nonsuit on Marigny's claim for punitive damages on the ground Marigny could not prove oppression, fraud or malice by clear and convincing evidence.[32] The trial court erred.

Because malice is defined, in part, as "conduct which is intended by the defendant to cause injury to the plaintiff,"[33] in the ordinary tort action "involving intentionally wrongful conduct, the evidence sufficient to establish the tort is usually sufficient to support punitive damages."[34] Thus, a nonsuit on the issue of punitive damages is proper

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[30] *Lawless v. Calaway* (1944) 24 Cal.2d 81, 94.

[31] We acknowledge the probable reason neither Mercury nor the trial court addressed Marigny's theory of negligent failure to prevent harassment from occurring was because the court previously granted summary adjudication on the harassment claim. See discussion in Part I, *ante*. It is our reversal of that summary adjudication, not the trial court's error on the nonsuit, which requires us to reverse the nonsuit on this theory of negligence.

[32] Punitive damages may be awarded "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice[.]" (Civ. Code, § 3294, subd. (a).)

[33] Civil Code section 3294, subdivision (c)(1).

[34] *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 497, footnote 1; and see *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1286.

only if the evidence of the underlying intentional tort is so marginal "no reasonable jury could find the plaintiff has presented clear and convincing evidence" of malice.[35]

The trial court denied Mercury's motion for nonsuit on the cause of action for intentional infliction of emotional distress and the jury unanimously awarded Marigny compensatory damages on this claim. These facts are relevant to our review of the nonsuit motion although they are not determinative.

A defendant "intends" to inflict emotional distress if he or she desires to cause such distress or knows such distress is substantially certain to result from the conduct or acts with reckless disregard of the probability of causing such distress.[36] We find the evidence of intent in this case more than marginal. According to Marigny's evidence, from the outset Mercury management responded to his complaints about racial harassment in a negative and dismissive manner. When informed a co-employee had called Marigny a "skinny little nigger" the Director of Human Resources told Marigny: "Everybody [has] a right to express themselves." Marigny also produced evidence this same human resources manager lied when he told EEOC investigators there were no witnesses to this racial slur other than Marigny.

From this and other evidence in the record, we conclude a reasonable jury could have found by clear and convincing evidence Mercury acted with malice as defined in the statute. The trial court should not have taken this issue from the jury.

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[35] *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 60.

[36] *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 300.

V. THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTIONS AND EVIDENTIARY RULINGS WITH RESPECT TO THE RETALIATION CAUSE OF ACTION.

A. Instructions On the Burdens of Persuasion and Production Of Evidence in the Retaliation Cause of Action.

At trial Marigny contended Mercury terminated him because of his complaints to management and the EEOC about his racially discriminatory treatment. Mercury contended it terminated Marigny solely because he failed to pass a security review mandated by the FAA and LAX. Marigny responded to Mercury's defense with evidence Mercury failed to follow the applicable security review procedures and rigged the results in order to cover up its true reason for terminating him—retaliation for his complaints about discrimination and a hostile work environment.

Thus, the jury was presented with a classic case of disparate treatment in which it had to decide whose evidence it found more convincing: Marigny's evidence of retaliation or Mercury's evidence of a legitimate employment decision. This was not a so-called "mixed motives" case in which both legitimate and illegitimate factors may have contributed to the employer's action and the jury has to decide whether the employer "placed substantial negative reliance on an illegitimate criterion."[37] Rather, the jury was presented a clear cut choice: either Mercury fired Marigny for complaining about racial discrimination or it fired him because he did not pass the security clearance.

With this background in mind, we review the trial court's instructions on the retaliation cause of action.[38] We conclude the instructions the trial court gave regarding

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[37] *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 277 (conc. opn. of O'Connor, J.); and see *Desert Palace, Inc. v. Costa* (2003) ___ U.S. ____, 123 S.CT. 2148, 2150-2151.

[38] The trial court instructed the jury, in relevant part:

proof of retaliation were not objectionable given Marigny's theory his alleged failure to meet the requirements for a security clearance was a pretext for his termination.

The trial court's instructions were based on the three-stage *McDonnell Douglas* test for disparate treatment.[39] Under this test the burden of proof is always on the plaintiff,[40] but the burden of production shifts between the parties as the test proceeds.

"The elements of a claim for unlawful employment discrimination are: (1) that the defendant was an employer; (2) the plaintiff was an employee of the defendant; (3) the plaintiff engaged in a legally protected activity, namely, complaining about perceived racial discrimination and harassment; (4) the defendant subjected plaintiff to an adverse employment action, namely, termination; (5) the plaintiff's protected activity was a motivating factor for the defendant's adverse employment action; and (6) the defendant's action caused the plaintiff injury, damage, loss or harm. . . .

"Once the plaintiff has proven these essential elements, then the burden shifts to the defendant. The defendant then has the burden of proof whereby it must articulate a legitimate, nondiscriminatory reason for the adverse employment action. Once defendant has articulated this, the burden then shifts back to plaintiff to prove that the reason articulated by the defendant for the adverse employment action is a pretext. . . .

"'Legally protected activity' includes complaining about (1) conduct that is unlawful; or (2) that the plaintiff reasonably believes is unlawful.

"If a plaintiff establishes a prima facie case of retaliation, Mercury may then present evidence that the decision makers were motivated by a legitimate nonretaliatory reason. The burden of proof remains at all times with the plaintiff to establish retaliation.

"If you find that Mercury has presented evidence that the decision makers were motivated by legitimate nonretaliatory reasons for any actions taken against the plaintiff, the plaintiff must then prove that Mercury's stated reasons are untrue and that the real reasons for the action taken was [sic] retaliation."

[39] *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802. California courts have adopted this test for FEHA cases. *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354.

[40] *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1750 and cases cited. In the present case, the trial court gave conflicting instructions on the burden of proof. At one point it told the jury, correctly: "The burden of proof remains at all times with the plaintiff to establish retaliation." At another point it told the jury, incorrectly, once the plaintiff proves a prima facie case, "[t]he *defendant then has the*

"First, it is the plaintiff's burden to prove by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff proves the prima facie case, then the burden shifts to the defendant to provide some legitimate nondiscriminatory reason for its employment decision. Third, if the defendant carries this burden, then the plaintiff must have an opportunity to show by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."[41]

The trial court instructed the jury on Marigny's initial burden of production using BAJI No. 12.10 which states the plaintiff must provide evidence "[p]laintiff's protected activity was *a* motivating factor for the defendant's adverse employment action . . . ." (Emphasis added.) The court then gave the jury special instructions submitted by Mercury which stated if Mercury presented evidence of a legitimate non-retaliatory reason for terminating Marigny: "You must decide whether the plaintiff has met his burden of proving by a preponderance of the evidence that Mercury's articulated reasons were not the true reason [sic] and that the true reason was retaliation."

Marigny objected to Mercury's special instructions in the trial court and he repeats his objection on appeal. He contends the trial court erred by instructing the jury in order for him to prevail on his retaliation claim he had to prove retaliation was *the* reason—not just a motivating factor—for his termination. The court's instructions were correct.[42]

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burden of proof [to] articulate a legitimate, non-discriminatory reason for the adverse employment action." (Italics added.) Because the incorrect instruction benefited Marigny, it is not ground for reversal.

[41] *Heard v. Lockheed Missiles & Space Co.*, *supra*, 44 Cal.App.4th at pages 1749-1750; citations omitted.

[42] Some appellate courts have suggested trial courts not use the *McDonnell Douglas* analysis in instructing juries because whether or not a plaintiff has established a prima facie case and whether or not the defendant has rebutted it are questions of law for the trial court. The only question for the jury is whether or not discrimination (or retaliation) was the determinative factor in the employer's action. (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 204; accord *Heard v. Lockheed Missiles &*

Marigny at all times bore the ultimate burden of persuading the jury Mercury fired him in retaliation for his complaints about racial discrimination.[43] To establish a prima facie case Marigny only had to produce evidence his complaints about racial discrimination were a motivating factor for his termination. This is so because if the jury believed Marigny's evidence and Mercury produced no evidence to the contrary the jury would have to find for Marigny on the retaliation cause of action.[44] Furthermore, Marigny could not fairly be required to prove a negative—that Mercury had no other reason for terminating him. However, once Mercury produced evidence it did have a legitimate non-retaliatory reason for terminating him, i.e., his failure to clear security, it was up to Marigny to persuade the jury by a preponderance of the evidence Mercury terminated him "because of" his complaints.[45] In other words, Marigny had the burden of proving the retaliatory motive was not just "a factor" but "a factor" which "had a determinative influence" on his termination.[46]

B. Evidentiary Rulings On the Retaliation Claim.

1. Exact language of the racial slurs against Marigny.

Prior to trial, the court ruled Marigny could not introduce evidence of the exact language used in racial slurs by Mercury employees, e.g., "nigger," "skinny little nigger," "boy" and "gangster." The court ruled the exact language which triggered Marigny's complaints to Mercury and the EEOC was irrelevant to Marigny's claim of retaliation for making the complaints. The court allowed Marigny and other witnesses to refer to these statements as "racial slurs" and "racially offensive" remarks. The court did not address

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Space Co., *supra*, 44 Cal.App.4th at pages 1758-1759. Because there will be no retrial on Marigny's retaliation cause of action we need not express a view on this issue.

[43] *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 143.

[44] *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at page 354.

[45] Government Code section 12940, subdivision (h).

[46] *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 610.

the relevance of the actual language to Marigny's cause of action for intentional infliction of emotional distress. We address that issue in Part VI, *post*. As to the cause of action for retaliation, we conclude the trial court ruled correctly.

As noted above, the elements of a FEHA retaliation claim are a protected activity followed by an adverse employment action, a causal link between the two and damages.[47] Evidence of the exact language Marigny found offensive and which caused him to complain to Mercury and the EEOC is irrelevant in proving the statutory tort of unlawful retaliation under the FEHA. The purpose of this tort is to require the employer to compensate the employee it retaliated against and to deter the employer from retaliating against other employees in the future. Its purpose is not to compensate and deter discrimination itself. Liability for discrimination and harassment is covered under separate sections of the FEHA.[48] Therefore, the exact language of the racial epithets has no "tendency in reason to prove or disprove any disputed fact that is of consequence" in an action for retaliation.[49]

Here, Marigny testified he complained about racial slurs and racially offensive remarks to Mercury and the EEOC. The trial court instructed the jury such complaints were a "protected activity."[50] Thus, the court did not prevent Marigny from offering proof of this element of his cause of action. Furthermore, Mercury did not contest this element of Marigny's case. On the contrary, in statements by its counsel to the jury and in testimony by its Director of Human Resources, Mercury agreed Marigny's complaints to the EEOC constituted "protected activity."

Marigny argues the actual words used in the racial slurs were relevant to prove Mercury's avowed ground for firing him was pretextual. Independent evidence of racial

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[47] *Fisher v. San Pedro Peninsula Hosp.*, *supra*, 214 Cal.App.3d at page 614.

[48] Government Code section 12940, subdivisions (a) and (j).

[49] Evidence Code section 210.

[50] See footnote 38, *ante*.

animus attributable to the employer may be relevant to proving pretext.[51] But the statements Marigny complained about were made by a co-employee and a low-level manager, not by the individuals who made the decision to terminate Marigny's employment.

Marigny further contends the exact language of the racial slurs was relevant to attacking the credibility of Mercury's personnel director who testified there were no witnesses to the "skinny little nigger" remark. We are not persuaded. As discussed above, Marigny was able to effectively impeach the testimony of the personnel director there were no witnesses to the use of the "N" word without having to quote the exact language.[52]

(2) Testimony the EEOC found Marigny's complaint unfounded.

Wayne Lovett, Mercury's house counsel, testified he monitored the progress of the EEOC investigation into Marigny's complaint. Asked how the EEOC resolved the complaint, Lovett answered: "The EEOC found the complaint to be unfounded . . . ."[53] Marigny objected to this answer on the ground it was hearsay. The trial court overruled the objection. Again, the trial court ruled correctly.

Lovett's testimony, "The EEOC found the complaint to be unfounded," was not hearsay. To be hearsay, the evidence must be a "statement" by the declarant.[54] A "statement" is an "oral or written verbal expression" or "nonverbal conduct of a person

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[51] *Aka v. Washington Hosp. Center* (D.C. Cir. 1998) 156 F.3d 1284, 1289.

[52] See discussion at page 11, *ante.*

[53] The question and answer were as follows: "Q. And do you recall what the resolution was, what Mercury was advised by the EEOC, the resolution of -- A. Yes I do. . . . The EEOC found the complaint to be unfounded, gave him a right to sue letter, which is what they do."

[54] Evidence Code section 1200, subdivision (a).

intended . . . as a substitute for oral or written verbal expression."[55] Lovett did not testify the EEOC stated the complaint was "unfounded." Rather, from the context of the question and answer it appears to us Lovett was expressing his opinion or characterization of the EEOC's resolution of Marigny's complaint.[56] The question might properly have been objected to on numerous grounds including irrelevancy, lack of foundation, improper opinion and undue prejudice; but hearsay it was not.

Even if we assume Lovett's testimony was hearsay, it was admissible; not to prove Marigny's complaint was *in fact* unfounded but to prove the EEOC "*found*" the complaint unfounded.[57] An analogous issue was presented in *Fowler v. Howell*.[58] The issue in *Fowler* was whether the trial court properly took judicial notice of factual findings adopted by the State Personnel Board in the underlying administrative matter to decide whether Howell acted within the scope of her employment when she charged Fowler with sexual harassment. The appellate court held the trial court properly took judicial notice the Board found "'only a few of [Howell's] charges' proven but 'the most serious charge . . . was not proven . . . .'"[59] As in this case, the administrative agency's findings were admissible to establish what the agency found, not the truth of its findings.

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[55] Evidence Code section 225.

[56] For example, we might write a disposition stating "the judgment is affirmed" but respondent's counsel might tell her client we found the appellant's arguments "unfounded."

[57] See *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1563, footnote 8, holding the hearsay rule does not prevent a court from taking judicial notice another court "in fact made a particular ruling."

[58] *Fowler v. Howell* (1996) 42 Cal.App.4th 1746.

[59] *Fowler v. Howell*, *supra*, 42 Cal.App.4th at page 1750.

Admittedly, the foregoing distinction may not have occurred to the jurors but Marigny could have asked the trial court to give the jury a limiting instruction or moved to strike the answer under Evidence Code section 352.[60] He did neither.[61]

(3) Marigny's remaining evidentiary claims are without merit.

Marigny cites numerous other evidentiary rulings by the trial court which he claims were erroneous and individually or collectively led to the jury's verdict for Mercury on the retaliation cause of action. We need not further extend this opinion with a detailed analysis of each of these rulings. The points have been examined and no reversible error appears.[62]

VI. THE TRIAL COURT COMMITTED PREJUDICIAL EVIDENTIARY ERRORS IN THE TRIAL OF MARIGNY'S CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

In a special verdict the jury awarded Marigny $15,000 damages on his claim for intentional infliction of emotional distress. Marigny appeals from this portion of the judgment contending but for erroneous evidentiary rulings the damage award would have been higher. Mercury did not cross-appeal.

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[60] In *Michail v. Fluor Mining & Metals, Inc.* (1986) 180 Cal.App.3d 284, 286, an action for sex discrimination, the court held the trial court properly granted the employer's motion under Evidence Code section 352 to exclude an EEOC finding of reasonable cause to believe the employer terminated the plaintiff due to her sex. The court did not address the employer's hearsay and relevance claims.

[61] As a tactical matter, Marigny reasonably may have concluded it was best to let the testimony move on to another area and not call additional attention to this evidence.

[62] Cf. *People v. Bassett* (1968) 69 Cal.2d 122, 148.

Before turning to the merits of Marigny's contention we address the question whether Marigny has standing to appeal from the portion of the judgment in his favor.

Two well-established rules appear to stand in his way. In order to appeal from a judgment a party must be "aggrieved."[63] Thus, a party typically cannot appeal from a judgment in its favor.[64] Furthermore, the failure to move for a new trial on the ground of inadequate damages[65] ordinarily precludes a party from complaining on appeal the damages were inadequate.[66]

There are, however, exceptions to both these rules. "A plaintiff may appeal from a judgment in his favor, when the amount of said judgment is less than the amount demanded and to which the plaintiff considered himself entitled."[67] Thus parties who have been awarded money judgments have nevertheless been permitted to seek greater monetary relief on appeal.[68] The rule requiring a party move for a new trial before complaining on appeal the damages were inadequate "does not preclude a party from urging legal errors in the trial of the damage issue such as erroneous rulings on

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[63] Code of Civil Procedure section 902.

[64] *Widener v. Hartnett* (1938) 12 Cal.2d 287, 290.

[65] Code of Civil Procedure section 657(5).

[66] *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 122 (hereafter *Glendale Fed*).

[67] *Maxwell Hardware Co. v. Foster* (1929) 207 Cal. 167, 170. In this case Marigny sought approximately $13,000 for past and future psychiatric counseling plus compensation for his emotional pain and suffering.

[68] See e.g., *Zarrahy v. Zarrahy* (1988) 205 Cal.App.3d 1, 4; *Leaf v. Phil Rauch, Inc.* (1975) 47 Cal.App.3d 371, 375, footnote 1; *Royat v. Roberts* (1951) 107 Cal.App.2d 447, 450.

admissibility of evidence . . ."[69] when such errors "resulted in an improper reduction of the damages."[70]

We conclude, therefore, Marigny has standing to challenge the trial court's evidentiary rulings affecting his damages for emotional distress.

Marigny contends the trial court made three erroneous rulings which affected his damage award: (1) the court precluded cross-examination to establish bias on the part of Mercury's psychiatric expert; (2) the court limited his claim for emotional distress to distress following his termination and excluded stress arising from the behavior of Mercury employees preceding his termination; (3); the court excluded evidence of the actual language of the racial slurs directed at Marigny by Mercury employees. The second and third contentions have merit.

A. The Trial Court Did Not Preclude Marigny From Establishing Bias On the Part of Mercury's Psychiatric Expert.

Mercury's psychiatric expert testified in his opinion Mercury did not cause Marigny any "definable mental or emotional disorder."

On cross-examination Marigny asked the expert: "[Y]ou understood that if your opinion had been that Mercury did cause injury to Mr. Marigny, they would not have kept you as an expert witness; is that your understanding? Mercury objected to the question and the trial court sustained the objection on the ground it called for speculation, explaining: "[He] didn't find that way. We don't know what [he] would have done or what they would have done."

We find no error. The question not only called for speculation, it was argumentative. The trial court acted well within its discretion in sustaining the objection.

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[69] *Glendale Fed*, *supra*, 66 Cal.App.3d at page 122, italics added.

[70] *Mendoyoma, Inc. v. County of Mendocino* (1970) 8 Cal.App.3d 873, 878.

In any event, we feel certain Marigny's point, for what it was worth, was not lost on the jury and the court's ruling had no effect on the outcome of the case.[71]

B. The Trial Court Erred In Excluding Evidence of Marigny's Pre-termination Distress.

The trial court ruled Marigny could not present evidence of emotional distress arising out of the Willard incident but could only claim damages "flowing from the act of discharge and forward." The court apparently believed allowing evidence of the Willard incident would be inconsistent with its earlier rulings granting Mercury's motion for summary adjudication on the cause of action for racial discrimination.[72] The trial court erred in its ruling.

Marigny did not limit his complaint for intentional infliction of emotional distress to post-termination distress. He alleged Mercury "subjected plaintiff to [outrageous] conduct during his tenure with Mercury Air Center." The alleged outrageous conduct included Mercury's "refusal to take remedial action" following the Willard incident including Mercury's dismissing racial slurs by its employees as the mere exercise by the employees of their "right to express themselves."

Furthermore, because Marigny's emotional distress cause of action was based on Mercury's *response* to his complaints of racial harassment, rather than the harassment itself, allowing him to introduce evidence of pre-termination distress would not have been inconsistent with the trial court's summary adjudication on the claims of harassment and discrimination. Whether or not use of racial epithets on a single occasion is sufficient to establish a hostile work environment, California courts have recognized a single racial epithet when condoned by management presents "aggravated circumstances"

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[71] See *Continental Dairy Equip. Co. v. Lawrence* (1971) 17 Cal.App.3d 378, 384.

[72] See discussion in Part I, *ante*.

supporting an employee's cause of action for intentional infliction of emotional distress against the employer.[73]

Finally, the trial court instructed the jury Marigny had to establish he "suffered severe emotional distress" in order to recover damages for intentional infliction of emotional distress.[74] "'Severe emotional distress,'" the court told the jury, "means substantial or enduring as distinguished from trivial or transitory. Severe emotional distress is emotional distress of such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure. In determining the severity of emotional distress you should consider its intensity *and its duration*." (Italics added.) Thus under the trial court's instructions the duration of Marigny's distress, measured from the time he initiated his complaint about the use of racial invectives in the work place, was clearly relevant to establishing the severity of his emotional distress and therefore his damages.

C. The Trial Court Erred In Excluding the Actual Language Used In the Racial Slurs Against Marigny.

We held earlier in this opinion the actual language used by Willard and others was properly excluded as irrelevant when offered as evidence of Mercury's alleged retaliation against Marigny.[75] This holding, however, does not apply to exclusion of the actual language when offered as evidence supporting Marigny's claim of emotional distress resulting from Mercury's failure to investigate and remedy his complaints about the use of such language.

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[73] *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 941, 947; *Alcorn v. Anbro Engineering, Inc.*, *supra*, 2 Cal.3d at pages 497, 499 [single incidents of racially vituperative language coupled with management's failure to investigate or remedy the incidents sufficient to establish intentional infliction of emotional distress].

[74] This instruction properly stated the law. (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494.

[75] See discussion in Part V B, *ante*.

The actual language used by Willard and others in the workplace was clearly relevant to Marigny's cause of action for emotional distress and should have been admitted for that purpose (with a limiting instruction if the trial court believed such an instruction was necessary).

It was not enough merely to inform the jury Mercury employees engaged in "inappropriate" or "racially offensive" speech. Hearing the actual words used, as opposed to the trial court's sanitized version, would have allowed the jury to judge the credibility of Marigny's emotional distress claim and its severity as related to Mercury's investigatory conduct.

Under the trial court's instructions, Marigny had the burden of proving "extreme and outrageous conduct" which, the court informed the jury, "is not mere insults, indignities, threats, annoyances, petty oppressions and other trivialities." Thus Marigny had to establish why he believed he was the victim of racial discrimination and harassment so the jury would understand why he complained, why he pursued his complaint and most importantly why Mercury's reaction to his complaint caused him severe emotional distress. Marigny could not establish this connection based simply on evidence of "inappropriate" language.[76] Marigny's "susceptibility to racial slurs and other discriminatory conduct is a question for the trier of fact."[77] We do not believe the jury could fairly make such an assessment without hearing the racial slurs themselves.

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[76] For example, references to African-Americans as "lazy" and references to African-Americans as "niggers" would both qualify as "inappropriate" or "racially offensive" but in the minds of some jurors at least there could be a significant difference in the outrage factor between those two racial slurs and consequently a significant difference in the severity of the emotional distress these jurors would be willing to credit to the person who was the target of these invectives. We do not suggest applying a pejorative label to a member of any racial or ethnic group is a nonactionable triviality. We are only recognizing that although all racial and ethnic insults wound, some may wound deeper than others. See Dark, "Racial Insults: 'Keep Thy Tongue From Evil,'" 24 Suffolk U. L. Rev. 559, 562-573; Delgado, "Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling," 17 Harv. C.R.-C.L. L. Rev. 133, 143-157.

[77] *Alcorn v. Anbro Engineering, Inc.*, *supra*, 2 Cal.3d at page 498, footnote 4.

D. The Trial Court's Evidentiary Errors Were Prejudicial.

The question remains whether the trial court's evidentiary errors were prejudicial. In other words, is it reasonably probable the jury would have awarded a greater sum in damages for intentional infliction of emotional distress if the trial court had not excluded evidence of Marigny's emotional distress related to Mercury's handling of the "Willard incident" and had allowed the jury to hear the actual language allegedly used by Willard? Although this is a close question, we conclude the trial court's errors were prejudicial.

Several aspects of the trial make prejudice a close question. Despite the trial court's ban on evidence of pre-termination distress the court did not instruct the jurors to consider only evidence of post-termination distress and the jury did have evidence of pre-termination distress to consider. Marigny's expert psychoanalyst testified Marigny suffered from post-traumatic stress disorder. She gave as an example: "On one occasion [Marigny] went to the doctors and they thought he was having a heart attack, he was so distressed. And that is a perfect example of when someone feels so threatened that they almost look like they are having a heart attack, dizzy, panicked, can't breathe, can't sleep, can't sit down, restlessness and fear." The expert testified these symptoms occurred in May 1999, the same month as the Willard incident.[78] Marigny did not make an offer of proof as to evidence his expert would have provided on pre-termination distress had she been allowed to do so. Therefore we cannot say with certainty what additional psychological evidence Marigny would have produced on the issue.

On the other hand we know from the record Marigny could have testified to the actual language of the racial insults in the Willard incident and to his emotional distress caused by Mercury's handling of the incident.[79] Without this evidence the jury

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[78] At a sidebar the trial court granted a defense motion to strike this testimony as outside the relevant time frame but never did so. Thus this evidence was before the jury in its deliberations.

[79] Marigny attempted to testify to his reaction but his testimony was cut short by the trial court based on its ban on evidence of pre-termination distress.

reasonably might have asked, "Where's the beef?" With this evidence, it is reasonably probable the jury would have awarded a greater sum in damages for intentional infliction of emotional distress.[80]

We turn, finally, to the appropriate remedy for the trial court's erroneous evidentiary rulings. The options are to grant Marigny a new trial as to liability and damages on the cause of action for emotional distress or to grant him a new trial only on the issue of damages.

In assessing the choice between a new trial on liability and damages and a new trial limited to damages only three factors are of particular importance: "(1) whether liability was clearly established at the first trial, (2) whether the evidence concerning damages was insufficient or entirely nonexistent; and (3) whether prejudice to a party would result [from] the choice of one disposition over the other."[81]

From the record we conclude liability for intentional infliction of emotional distress, aside from the Willard incident, was clearly established. The verdict was unanimous, it exceeded the amount of Marigny's medical expenses, there is no evidence of jury indecision and Mercury did not cross-appeal from the judgment.[82]

The evidence concerning damages related to the Willard incident was virtually non-existent due to the trial court's erroneous evidentiary rulings.

Requiring Marigny to relitigate the entire emotional distress cause of action (liability and damages) would prejudice him more than a retrial limited to damages would prejudice Mercury. It was Mercury which insisted on keeping out evidence of emotional

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[80] In *Agarwal v. Johnson*, for example, the plaintiff sued his former employer and two of his former supervisors. He testified one of the supervisors called him "nigger" and "inferior." The jury awarded plaintiff general damages of $16,400 plus punitive damages. (25 Cal.3d at pp. 941, 944.) This verdict occurred in the late 1970's.

[81] Cf. *Tan Jay Internat., Ltd. v. Canadian Indemnity Co.* (1988) 198 Cal.App.3d 695, 705; citations omitted.

[82] *Lauren H. v. Kannappan* (2002) 96 Cal.App.4th 834, 840-841.

distress related to the Willard incident. The trial court's evidentiary rulings only affected damages stemming from the Willard incident. And lastly, Mercury did not cross-appeal from the verdict on the emotional distress cause of action.

Having determined Marigny is entitled to a new trial on damages the next question is whether the trier of fact should retry damages completely, i.e. damages for pre-termination and post-termination distress, or whether the trial should be limited to damages for pre-termination distress since a jury has already awarded Marigny $15,000 for post-termination distress.

Normally, when a new trial is ordered on the ground of inadequate damages on a tort cause of action the issue of damages is retried completely.[83] This makes sense in the usual case because a plaintiff is entitled to but one recovery on a single cause of action.[84] Here Marigny alleges a single tort (infliction of emotional distress) continuing over a period of time, both before and after his termination. Because there is only a single, albeit cumulative, injury there should be only a single, albeit cumulative, damage award. Practical considerations also come into play. It is difficult to predict how the new jury's assessment of "pre-termination" damages would be influenced by the damages already allowed for "post-termination" injury if the jury was told about the previous recovery. On the other hand, if the jury was not told about the previous recovery, or even if it was, it might be difficult to prevent or detect some double counting. Furthermore, because we are permitting the jury to consider an award of punitive damages on this cause of action,[85] Marigny will want the jury to hear all the evidence as to Mercury's conduct before and after termination so there is no judicial efficiency in limiting the scope of the new trial to pre-termination damages. Finally, because there needs to be a reasonable relationship

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[83] See e.g. *Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722, 726; *Hatch v. Lewis* (1969) 274 Cal.App.2d 150, 151, 153.

[84] *Overstreet v. Merritt* (1921) 186 Cal. 494, 501.

[85] See discussion in Part IV, *ante*.

between compensatory and punitive damages,[86] the jury would need to consider Marigny's emotional injury as a whole not just an isolated portion of the injury.

Still, it could be argued it is unfair to require Marigny to risk the $15,000 he has already been awarded for post-termination distress in order to try to obtain just compensation for his total emotional distress. It is conceivable a jury retrying the damage issue in its entirety could award Marigny less than $15,000 in compensatory damages. A trial should not be like a quiz show in which the plaintiff must wage what he has already won in order to get what what is behind "door number two." One solution would be leave the previous $15,000 award intact, not to tell the new jury about it, allow the jury to consider Marigny's total emotional distress in determining compensatory and punitive damages and then have the trial court deduct the $15,000 previously awarded.

We believe there are three answers to the unfairness argument. It is extremely unlikely a new jury would award Marigny less than $15,000 in compensatory damages for his total emotional distress when a previous jury awarded him that amount for his "post-termination" distress alone. Indeed, the only reason Marigny is being awarded a new trial on damages at all is because we have concluded it is reasonably probable he will receive a higher award, especially when the jury hears the evidence which was excluded from the first trial. Moreover, because we have held $15,000 is an inadequate award for Marigny's total emotional distress a new award of less than that amount would be ipso facto inadequate and entitle Marigny to a new trial on damages. Yet, while the remedy for possible unfairness which might result from ordering a complete new trial on damages would be another new trial on damages we conclude the slight risk of that negative is outweighed by the complications and confusion which would arise in attempting to retry only the issue of pre-termination damages. It would be better simply to retry completely the issues of compensatory and punitive damages for emotional

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[86] *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) __ U.S. ___, 123 S.Ct. 1513, 1524, 155 L.Ed.2d 585.

distress after instructing the jury liability for that cause of action has already been determined.

DISPOSITION

The judgment in favor of defendant is reversed as to the causes of action for racial discrimination, racial harassment, negligent failure to prevent and remedy racial harassment and as to punitive damages and costs. The judgment in favor of plaintiff on the cause of action for intentional infliction of emotional distress is affirmed as to liability and reversed as to damages and the cause is remanded to the trial court with directions to award plaintiff a new trial on the issues of compensatory and punitive damages. In all other respects the judgment is affirmed. Plaintiff is awarded his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, J.

We concur:

PERLUSS, P.J.

MUNOZ (AURELIO), J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.